File 7/25/19 Marriage of Goel CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of RUSHMI and VINEET GOEL. ——————————— RUSHMI GOEL, Respondent, v. VINEET GOEL, Appellant.	B287556 (Los Angeles County Super. Ct. No. BD491563)

APPEAL from orders of the Superior Court of Los Angeles County, David A. Rosen, Judge. Affirmed.

Law Office of Corey Evan Parker and Corey Evan Parker for Appellant.

Friedman & Friedman, David Friedman, Cynthia Bleifer and Ira Friedman for Respondent.

INTRODUCTION

In 2008, Rushmi petitioned for dissolution of her marriage to appellant Vineet.[1] Rushmi represented to the court under penalty of perjury that: 1) she left India and was residing in the U.S.; 2) she had not worked or earned income in over 20 years; 3) she had $7,550 in estimated monthly living expenses in the U.S.; and 4) she had nominal funds/assets and no access to community funds, as Vineet was in exclusive control of all community assets.

Years after the dissolution judgment was final, Vineet claimed Rushmi perjured herself when she made these representations. Citing Rushmi's perjury, Vineet filed numerous motions to set aside and/or vacate the judgment and a spousal support order from 2008; his motions were denied as untimely or as lacking sufficient evidence that Rushmi perjured herself.

Vineet appeals from an order denying his most recent motion to vacate and/or set aside a spousal support order made in October 2008 and the default judgment of dissolution entered against him in June 2010. He argues the trial court erred in determining his request was untimely and insufficient to prove Rushmi's perjury. Rushmi has moved to dismiss the appeal under the disentitlement doctrine. We decline to dismiss the appeal and conclude the trial court did not abuse its discretion in denying Vineet's most recent motion to vacate.

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[1] Because the parties share the same last name, we will refer to them by their first names to avoid confusion.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Pendente Lite Orders*

On October 11, 1980, Vineet and Rushmi were married in New Delhi, India. After nearly 28 years of marriage, Rushmi filed a petition for dissolution from Vineet on August 21, 2008.[2] She also filed an order to show cause (OSC) requesting guideline spousal support and attorney fees and costs. In her sworn declaration in support of the OSC, Rushmi stated the following, in relevant part:

1) Husband Vineet is a resident of California, where he is employed, whereas Rushmi lived in India. Rushmi would travel "back and forth between India and California," as they "maintained dual residences in both India and California." Rushmi "spent substantial time living . . . in California with Vineet."
2) Rushmi now plans to remain in the United States.
3) Rushmi has "always been completely financially dependent on Vineet during [their] long marriage." Vineet "sends money back to [Rushmi] in India for [her] support" and has "no other means of financial support aside from Vineet."
4) Rushmi was "a stay-at-home mother" for their children (now all adults). The last time she had any

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[2] In her petition, Rushmi stated the exact nature and extent of her separate property, assets, and debts, and her community and quasi-community property, assets, and debts "are unknown at this time" and she "requeste[ed] leave to amend when same is ascertained." She also requested that Vineet pay her spousal support and attorney fees.

employment was 23 years ago when she "worked for a few months in 1985." Today, she has "no marketable skills, nor employment experience."

5) They enjoyed a "high marital standard of living."
6) Rushmi has "no access to any of [their] community funds" because Vineet is in "sole control of all of [their] financial accounts."

Additionally, in a sworn income and expense declaration (IED) filed with the OSC, Rushmi declared she has "not worked for the last 23 years," obtained no degrees, has "nominal" funds, and estimated $7,550 in total monthly expenses to enable her to find housing in the U.S. Rushmi attached as an exhibit to her declaration, "an immigration form [filed by Vineet] with the U.S. Homeland Security, . . . indicating that his income is $150,000 a year."

On September 26, 2008, Vineet filed a response to the petition, and a declaration opposing Rushmi's OSC. In his declaration, he requested that the court "[d]ismiss the marriage dissolution case" and Rushmi's pending OSC. He contended Rushmi is a citizen and resident of India, and that—at the time of the filing of her petition—she was "in India and ha[d] no legal visa to enter the USA." He also contended Rushmi "misguided" the court by stating in her declaration that she plans to remain in the United States.

On October 6, 2008, the court held a hearing on Rushmi's OSC. Vineet had previously advised the court that he would be out of the country on business on that date and did not appear at the hearing. Rushmi and her counsel were present. Rushmi's counsel represented that his client "hasn't worked for 28 years. This is a long-marriage case. He has always supported her. He

gives her an allowance each month. This is a situation where the Respondent is in control of all of the community property and funds." The court then deemed Vineet's income as $12,500 a month,[3] and ordered him to pay Rushmi pendente lite spousal support of $4,424 per month, pursuant to Family Code section 4320.[4] The court also ordered Vineet to pay $10,000 in attorney fees to Rushmi. We hereinafter refer to these initial orders of the court collectively as the "October 2008 Order."

B. *The Road to Entry of Default Against Vineet*

In December of 2008, Vineet filed a motion to modify and a motion to set aside the October 2008 Order. Rushmi filed an OSC to compel discovery responses. During the May 6, 2009 hearing on these motions, the court granted Rushmi's OSC to compel discovery responses. Vineet was ordered to produce discovery responses to Rushmi's counsel by June 5, 2009. In continuing Vineet's motions to a later date, the court told Vineet: "It's not fair to proceed on your motions if [Rushmi's counsel] doesn't have the information that he needs. And you have denied him that ability to respond to your motions. So once you provide him with those documents, he will file a response."

During a hearing on August 25, 2009, Rushmi's counsel informed the court that Vineet did not provide responses in compliance with the May 2009 order; counsel argued Vineet

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[3] In determining Vineet's monthly income, the court relied upon the information on the form Vineet had filed with U.S. Homeland Security and "presume[d] it is under penalty of perjury through homeland security."

[4] All further statutory references are to the Family Code unless otherwise indicated.

"forfeited his right to deal with his request to modify or set aside the support orders." The court ordered Vineet's motion and OSC off calendar. The court also granted Rushmi's ex parte request that the funds from Vineet's HSBC retirement account, totaling "approximately $120,000," be seized and transferred to Rushmi's counsel's trust account, and be utilized to pay Rushmi the court-ordered spousal support and attorney fees owed to date.[5]

In September 2009, Vineet filed a motion to reconsider the court's August 25, 2009 order, and Rushmi filed a motion for issue, evidence, terminating, and monetary sanctions against Vineet for failure to comply with court orders. The hearing on these motions took place on November 2, 2009. Vineet's motion for reconsideration was denied, whereas Rushmi's motion for sanctions was granted. The court issued terminating sanctions against Vineet, struck his response to the petition, and told Rushmi to "proceed to move th[e] case forward, and to trial, as a default proceeding." The court awarded Rushmi "attorney fees and sanctions . . . to be paid forthwith from what is remaining of [Vineet's] one-half share of the HSBC funds currently held in" Rushmi's attorney's trust account.[6]

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[5] Before the court ruled on Rushmi's ex parte request, her counsel argued: "I have . . . a wife, who—on a long marriage case—has no way to support herself. . . . [H]e isn't complying with his spousal support . . . . She needs to buy groceries and pay rent . . . [¶] . . . [¶] . . . She hasn't worked in over 20 years. *She has no source of income. That's undisputed.*" (Italics added.)

[6] On our own motion, we take judicial notice of the November 2, 2009 order after hearing ("incorporated by reference" in the November 2, 2009 minute order), attached as an exhibit to Vineet's declaration opposing Rushmi's motion to dismiss the

C. *Default Trial and Default Judgment*

At the June 14, 2010, default trial, Rushmi's counsel represented to the court that Rushmi "doesn't work," has "been a homemaker for most of the marriage," and "doesn't have anything at this point." As to the issues of property division and breach of fiduciary duty, Rushmi requested that the court award her "100 percent" of the community property assets she had located, as a result of the "extreme degree" of "fraud and malice" perpetrated by Vineet throughout the case. As to spousal support, Rushmi requested that the current temporary spousal support order of October 2008 remain in effect. Finally, as to attorney fees and costs, Rushmi requested that Vineet be "ordered to pay all of her fees under [section] 2030, disparity of income, and [section] 271 . . . ."

The court made the following findings and orders: 1) as for division of property, Rushmi was awarded "one-half of all of the community property as stated in the trial brief," which is "one-half of $433,695.13"; 2) as for breach of fiduciary duty, the court found Vineet "has been in breach" and failed to comply with Rushmi's discovery demands and, as such, awarded Rushmi with the remaining one-half of the community assets, or $216,982, as sanctions; 3) as for spousal support, the court adopted the findings as provided in Rushmi's trial brief and awarded permanent spousal support in the amount of $4,500 per month; 4) as for spousal support arrearages, the court ordered $44,294 in arrearages to be paid by Vineet forthwith; and 5) as for attorney

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appeal. (Evid. Code, §§ 452, 453, 459.) As an aside, the record is unclear when the clerk actually entered default against Vineet.

fees, the court ordered Vineet to pay fees "pursuant to [sections] 2030 and 271" in the amount of $29,328.

On June 22, 2010, the court entered a default judgment prepared by Rushmi's counsel.

D. *Post-Judgment Proceedings and Orders*

Four years later, on July 16, 2014, Vineet filed a motion to set aside portions of the default judgment on the ground that portions of the judgment exceeded the scope of the relief Rushmi requested in her petition for dissolution. He also sought to set aside the attorney fees awarded under sections 2030 and 271 on the ground that fees cannot be awarded by default under these sections.

On October 10, 2014, the court granted Vineet's motion in part, and "deleted as void" paragraph II (A) through (F) and paragraph III (A) through (C) of the default judgment, as Rushmi had failed to identify any separate property or community property in the petition, did not allege any breach of fiduciary duties or any other basis for sanctions, and "because the Petition was never amended or notice otherwise given to [Vineet] as to the claims being made and the relief being requested."[7] As for the

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[7] In issuing said ruling, the court provided the following reasoning and analysis: "The community estate may be divided by default judgment only where all applicable property relief sections of the [petition for dissolution] served on respondent were completed; i.e., petitioner complies with due process simply by listing all currently-known community and quasi-community property assets and obligations in the petition . . . . [Citation]. The court cannot award by default judgment any asset or obligation that was not identified as alleged community property in the pleadings served on respondent. Petitioner's introduction of evidence at a default prove-up hearing relating to assets or

attorney fees awarded by way of paragraph IV (A) of the default judgment, the court held "to the extent it was based on Section 2030, it did not exceed the Petition. As the Judgment does not characterize the fees as sanctions, this portion of the Judgment should not be deleted."

Because of these changes to the judgment, the only remaining amounts at issue are the $4,500 in monthly spousal support; the $44,294 in arrearages owed by Vineet to Rushmi; and $29,328 in attorney fees.

E. *The Evidence of Rushmi's Alleged Perjury and The Court's Rejection of the Evidence*

A year later, on October 28, 2015, Rushmi testified in the Delhi High Court of India about disputes over property ownership. In her testimony, she stated:

1) She completed her master in political science and diploma in business management from D.I.M.S. before her marriage.
2) From 1987 to 1990 she had no income. From 1990 onwards she started "taking private tuitions" and her "income from tuitions fluctuated between [5000 rupees] per month to [15000 rupees] per month. In Farmers Apartments [she] was earning about [10,000

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liabilities not put in issue by the pleadings served on respondent does not operate as a 'de facto amendment' of the petition, thereby 'opening up' the default as to those items. [Citation.] Unless respondent is given a new 30-day period to file a response, the default judgment as to those items is subject to set-aside at any time. [Citation.] [¶] . . . [¶] The same due process principles apply to a confirmation of separate property."

rupees] per month. In Patel Apartments [she] was earning [12,000 to 15,000 rupees] per month. In Kamdhanu Apartments [she] was earning about [12,000 to 15,000 rupees] per month. At present also [she is] taking tuitions and . . . teach[es] students uptill [*sic*] 10th class of all subjects."

3) She had saved her earnings until 1996 and her savings were "in the form of UTI, Indira Vikas Patra and bank account." Some of the savings were in the joint name of Rushmi and Vineet and some were in Rushmi's name alone.
4) She had purchased the Kamdhanu Apartment property from Mrs. Bhattacharya in 1996 under her own name. The purchase price was 700,000 to 800,000 rupees and Rushmi had paid the cash out of savings she retained at home and by sale of her jewelry.
5) She does not think she had stayed in the U.S. from 2005 to 2008 and she had gone to the U.S. in 2008 to "appear in the court."

F. *The First Request to Set Aside*

Vineet obtained a transcript of the hearing in India and in April 2016, pursuant to section 2122, subdivision (b), filed a request for order (RFO) to set aside the modified default judgment and/or vacate the spousal support and attorney fee awards in the judgment. Vineet brought to the court's attention Rushmi's allegedly perjurious statements in prior pleadings she had filed throughout the life of the dissolution action. He argued that based on Rushmi's October 2015 testimony in Delhi alone, the spousal support calculation in the October 2008 Order, the

resulting support arrearages, the attorney fee awards based on disparity of income, and the corresponding support and attorney fee awards in the judgment were all obtained as a result of Rushmi's perjury.

The court heard argument on May 12, 2016, and took the matter under submission. In its ruling dated May 31, 2016, the court denied Vineet's request and made the following findings, in relevant part: 1) "In the Indian proceedings, . . . [Rushmi] testified that she was working as a tutor in India during the period that she claimed in this court that she was not working"; 2) "Through this tutoring, she earned enough money to pay the rent herself and, by 1996, she had saved enough from her earnings to be able to purchase an apartment building in her own name, the Kamdhanu Apartments, where she has resided ever since"; and 3) She testified in the Indian litigation that in 2008, "she traveled to Los Angeles only for purposes of appearing at the court hearing on October 6, 2008" and that she was "not a U.S. resident in 2008."

The court then found that Vineet's RFO was "not timely" because "[t]he statements that are at issue – Wife's work history and country of residence – are facts that Husband could and should have recognized immediately as either true or false." The court then stated that even if Vineet's request was timely, the court "still would deny it because *the evidence does not establish what is required*," i.e., a showing of perjury in Rushmi's preliminary/final disclosures or in the "current" IED.[8] The court

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[8] Based on a review of the record—namely, the case summary—as of the date of the default trial and judgment in June 2010, the most recent and/or "current" IED filed by Rushmi was on September 30, 2009. In this IED, Rushmi stated under

held that Vineet showed Rushmi "may have committed perjury in an [IED] in 2008" but that he made no showing that "the trial and Judgment in 2010 were based on the earlier [IED]."[9]

G. *The Second Request To Set Aside*

On June 22, 2017, Vineet again filed an RFO to vacate the October 2008 Order and the June 22, 2010 default judgment; in his request, Vineet stated that he now has "absolute proof of [Rushmi's] dishonesty" and is "seeking to vacate . . . based on fraud and perjury." The proof Vineet referred to was a report prepared by the Foreigner Regional Registration Offices (FRRO) in New Delhi, which included the dates on which Rushmi departed from and arrived back in India from January 1, 2007 through February 27, 2017. However, Vineet did not have a copy of the report itself, as it was confidential, and instead merely provided information about what was contained in the travel records. Although a subpoena was issued to obtain the FRRO report and to have it authenticated by way of the personal appearance of a custodian of the records from India, Vineet's counsel had been informed that the subpoena "would not be honored."

Vineet requested a continuance to request a commission be issued by the court, to permit the taking of the official's

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penalty of perjury that she has "not worked for the last 24 years" and has $0 income, "nominal" funds in deposit accounts, and $7,550 in monthly expenses.

[9] On July 21, 2016, Vineet filed an appeal of the court's May 2016 order, case No. B276377; the appeal was dismissed on January 11, 2018 pursuant to California Rules of Court, rule 8.220(a)(1), for Vineet's failure to timely file an opening brief.

deposition in India; Rushmi did not agree to continue the hearing. Vineet then suggested that Rushmi "agree that these records, which have been made available to him and [Rushmi], come into evidence so that [the parties] could have the hearing on all issues as scheduled," but it appears Rushmi again refused.

The court denied Vineet's renewed request to set aside the judgment and held that because Vineet did not have the travel records themselves, he "has nothing" to support his request to set aside.

H. *The Third Request to Set Aside*

On October 16, 2017, Vineet filed a third RFO to set aside and/or vacate the October 2008 Order and the remaining portions of the default judgment. This time, he had the authenticated FRRO record of Rushmi's travels. The FRRO record stated that during the four year span of 2007, 2008, 2009, and 2010, (i.e., from a year prior to the filing of Rushmi's petition until after the entry of the default judgment), Rushmi left India for a total of only 36 days. Vineet argued that although his request appeared similar to his prior request from a few months back, his current request "has facts with authentic evidence from [the] Government of India Immigration Bureau."

At the hearing on November 22, 2017, the court said to Vineet: "[T]he problem that you have, . . . is that what you refer to as new evidence has actually been submitted to this court before on at least one, if not two prior request[s] for orders."[10]

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[10] The court further reasoned: "Referring now to the documentation of the proceeding in India. The fact that you've already submitted it to the court in prior [RFO]s – and those requests were denied – distinguishes this case from the *Rubenstein* matter, which is the reported case on which you

The court took the matter under submission and issued its ruling on December 7, 2017; Vineet's third RFO was denied and the court him to pay Rushmi's counsel $2,500 in sanctions.

This appeal followed.

DISCUSSION

A. *We Deny Rushmi's Motion to Dismiss the Appeal.*

Rushmi contends we should dismiss Vineet's appeal based on the disentitlement doctrine because Vineet "disobeyed every court order from the trial court." We do not find disentitlement to be an appropriate sanction in this case and decline to dismiss the appeal.

"An appellate court has the inherent power, under the 'disentitlement doctrine,' to dismiss an appeal by a party that refuses to comply with a lower court order." (*Stoltenberg v. Ampton Investments, Inc.* (2013) 215 Cal.App.4th 1225, 1229 (*Stoltenberg*).) "A party to an action cannot . . . ask the aid and assistance of a court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of this state." (*MacPherson v. MacPherson* (1939) 13 Cal.2d 271,

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understandably rely on. In *Rubenstein*, ultimately, at the time of the decision of the trial court, there was truly new evidence that was presented by the moving party. But there isn't new evidence here. [¶] And I would also add, for whatever it's worth, that on the prior occasion or occasions when the documentation relating to [Rushmi]'s activities in India was presented to the court, the court found it to be unpersuasive in the sense that it didn't change anything about what the court had decided or ruled in this case before. So given that – but more importantly, given the fact that it's not new evidence and no new evidence was submitted in support of this RFO, I am denying your [RFO]."

277.) A formal judgment of contempt is not a prerequisite to disentitlement; we may dismiss an appeal " 'where there has been willful disobedience or obstructive tactics.' " (*Stoltenberg*, *supra*, at p. 1230, italics omitted.)

Disentitlement is not a jurisdictional doctrine, but a " ' "discretionary tool that may be applied when the balance of the equitable concerns makes it a proper sanction." ' " (*Stoltenberg*, *supra*, 215 Cal.App.4th at p. 1230.) The disentitlement doctrine " 'is particularly likely to be invoked where the appeal arises out of the very order (or orders) the party has disobeyed.' " (*Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.* (2015) 238 Cal.App.4th 259, 265.)

Rushmi provides three instances of Vineet's "contemptuous behavior" warranting dismissal. First, she claims Vineet "never paid the $3,000 in sanctions" per the November 2, 2009 order. However, according to the order after hearing of the same date, Rushmi's counsel was ordered to pay the sanctions from Vineet's one-half share of the HSBC funds (totaling approximately $120,000) that were seized and transferred to Rushmi's counsel's attorney-client trust account. Thus, the $3,000 sanctions were paid.

Second, she claims Vineet "fail[ed] to pay any spousal support" and did not "[pay] a dime towards [spousal support] arrears." The record indicates otherwise. On August 25, 2009, the court ordered Rushmi to utilize the seized funds to pay herself the spousal support owed to date. Additionally, Vineet states in his opposition to Rushmi's motion to dismiss, that $22,000 were garnished from Vineet's wages and $54,300 were garnished from his social security benefits, as and for spousal

support to Rushmi.[11] A review of the record demonstrates that on October 6, 2008, an earnings assignment order for spousal support was filed and on July 3, 2013, an income withholding order for $4,500 per month (the permanent spousal support figure) was filed and entered. Plus, Rushmi herself confirmed—in her declaration accompanying the motion to dismiss—that she obtained an earnings assignment order "to garnish Vineet's Social Security benefits in order to collect the spousal support."

Lastly, Rushmi claims Vineet failed to pay $29,328 in attorney fees ordered at the June 2010 default trial and $2,500 in sanctions awarded by the court's December 7, 2017 order. We find it inequitable to dismiss the appeal on the basis of such alleged misconduct; we do not believe Vineet's failure to pay the balance of attorney fees and sanctions owed to Rushmi rises to a level of willful disobedience and/or obstruction warranting dismissal of his appeal. The right to an appeal " 'must not be lightly forfeited, and where a doubt exists as to a litigant's conduct being contumacious or willful, an appellate court will tolerate temporarily the acts which were disruptive of the judicial process. We always prefer to resolve a cause on its merits; once the rights of the parties have been determined with finality, then

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[11] We note that although Vineet claims to have had $22,000 in wages and $54,300 in social security benefits garnished and instead paid to Rushmi as and for spousal support, our review of the record yielded no help as to whether the *amounts* alleged are, in fact, true. It is not this court's task to search the record for evidence that supports a party's factual statements. (*In re Marriage of Tharp* (2010) 188 Cal.App.4th 1295, 1310, fn. 3; *Regents of the University of California v. Sheily* (2004) 122 Cal.App.4th 824, 826, fn. 1.)

the thwarted authority and offended dignity of the court may be assuaged with condign sanctions to the extent of the affront.' " (*Stoltenberg*, *supra*, 215 Cal.App.4th at pp. 1231–1232.)

We thus exercise our discretion to decline dismissal pursuant to the disentitlement doctrine.

B. *The Trial Court Did Not Err in Denying Vineet's Third RFO.*

Vineet contends the trial court erred when it determined: 1) his motion to set aside the amended judgment was not timely; and 2) the evidence presented did not establish a showing of perjury in Rushmi's disclosures or in her "current" IED.

1. Standard of Review and Applicable Law

We review the trial court's ruling on Vineet's October 16, 2017 request to set aside and/or vacate under section 2122 for abuse of discretion. (*In re Marriage of Rosevear* (1998) 65 Cal.App.4th 673, 682–683; *In re Marriage of Varner* (1997) 55 Cal.App.4th 128, 138.) " 'A trial court's exercise of discretion will not be disturbed on appeal unless, *as a matter of law,* an abuse of discretion is shown—i.e.,—where, considering all the relevant circumstances, the court has "exceeded the bounds of reason" or it can "fairly be said" that no judge would reasonably make the same order under the same circumstances." (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 480.) " 'So long as the court exercised its discretion along legal lines, its decision will not be reversed on appeal if there is substantial evidence to support it.' " (*Ibid.*)

Section 2122 applies only to marital dissolution cases and authorizes a judgment to be set aside on specified grounds, including, on grounds of "perjury in the preliminary or final declaration of disclosure, . . . or in the current income and

expense statement . . . ." (§ 2122, subd. (b).) Under section 2122, subdivision (b), an action or motion based on perjury "shall be brought within one year after the date on which the complaining party either did discover, or should have discovered, the perjury." When the perjury was discovered or should have been discovered are questions of fact, reviewed for substantial evidence. (*City of San Diego v. U.S. Gypsum Co.* (1994) 30 Cal.App.4th 575, 582 [statute of limitations is generally a question of fact].)

2. Analysis

As an initial matter, it appears to us that at least one of Vineet's arguments pertain to the court's May 31, 2016 ruling denying his first RFO, filed in April 2016. In his opening brief, Vineet entitled his argument sections regarding this issue as follows: "I. The court erred in determining Mr. Goel's allegation of perjury was not timely and did not present new evidence" and "II. The trial court erred in holding the evidence does not establish a showing of perjury in the preliminary or final declaration of disclosure, the waiver of the final declaration of disclosure, or in the current income and expense statement." Vineet's second argument is with respect to the court's May 31, 2016 order denying Vineet's first request to set aside. However, the appeal before us is from the order entered December 7, 2017, denying Vineet's third RFO, filed October 16, 2017 and heard on November 22, 2017. At no time during the hearing on the third RFO did the court find that the evidence failed to prove Rushmi committed perjury in her disclosures or IED; the court denied Vineet's motion because it found that Vineet did not present any "new" evidence, per *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131 (*Rubenstein*), the case on which Vineet relied upon then and now.

In *Rubenstein*, husband's dissolution petition claimed that he and his wife had no community assets. (*Rubenstein*, *supra*, 81 Cal.App.4th at p. 1136.) Wife contended her husband possessed ownership rights to the music of Jimi Hendrix and George Clinton, and she claimed a community share of that interest. (*Id*. at p. 1137.) In subsequent trial briefs, wife accused husband of perjury and asserted that husband was hiding income he received from the Hendrix estate. (*Ibid*.) At trial, however, husband testified that he never had any ownership interest and never acquired any royalty or other interest from the Hendrix estate. (*Ibid*.) The trial court found there were no community assets. (*Ibid*.) Within a month, wife filed a motion to vacate the judgment and a motion for a new trial on the ground that husband "gave false testimony at trial and that she had newly discovered evidence regarding community property"; the court again found no community assets, and our colleagues in Division Seven rejected wife's contentions and affirmed on appeal. (*Ibid*.)

More than five years later, wife filed an action to set aside the judgment, alleging husband procured the judgment through perjury and fraud. (*Rubenstein*, *supra*, 81 Cal.App.4th at p. 1138.) She attached a copy of a pleading filed by husband in a federal court action in 1994, where he claimed he had proprietary rights in Hendrix's records, owned copyrights and property rights in the audio recordings, and had rights to packaging and promotional materials, etc. (*Id.* at pp. 1138–1139.) The trial court, however, did not provide relief to wife.

On appeal, Division Three of this court reversed and held that the one-year statute of limitations to file a request to set aside a judgment based on perjury, as set forth in section 2122, "accrues as of the date the plaintiff either discovered or should

have discovered *the facts constituting the fraud or perjury*, not the date the plaintiff began to suspect the fraud or perjury." (*Rubenstein*, *supra*, 81 Cal.App.4th at p. 1149.) The reviewing court rejected husband's references to wife's prior allegations of perjury as evidence that wife "must have discovered the necessary facts" years prior. (*Ibid.*) The court explains: "In essence, [husband] equates [wife]'s allegations of fraud and perjury with her discovery of the facts constituting the fraud and perjury. However, [husband]'s reference to [wife]'s unsupported allegations fell far short of a showing by [husband] that [wife] then knew or should have known the facts constituting the fraud or perjury. The *evidence* from the federal action, now relied on by [wife], did not exist [before] and therefore could not have been discovered at that earlier time." (*Id*. at pp. 1149–1150.)

We believe *Rubenstein* does not apply to Vineet's appeal before us for the following reasons.

First, as set forth in section 2122, Vineet had one year from the date on which he discovered or should have discovered the perjury to bring his motion to set aside. However, based on a review of the record before us, the problem in the underlying proceedings is that there were *multiple* alleged perjuries by Rushmi regarding multiple, differing facts. She not only allegedly perjured herself regarding her place of residence, but also allegedly perjured herself regarding her income and expenses, her education and earning ability, etc., all of which materially affected the outcomes of the October 2008 Order and the modified judgment. "*Any perjury* in the underlying proceedings that *materially affected* the outcome . . . is . . . a cognizable ground for relief." (Hogoboom & King, Cal. Practice

Guide: Family Law (The Rutter Group 2019) ¶ 16:113, second & fourth italics added.)

Although he had "strong suspicions" that Rushmi perjured herself about residing in the United States during the time prior to the October 2008 Order, Vineet contends he did not have the evidence to support his suspicions until he obtained the FRRO report. We disagree. From the record, it is clear Vineet was aware of Rushmi's alleged perjury about where she lived when he stated in his September 2008 opposition to Rushmi's OSC for spousal support that Rushmi was a citizen and resident of India with no legal visa to stay in the United States. Thus, as to his allegations of Rushmi's alleged perjury about her place of residence, it appears Vineet already knew the *facts* about Rushmi's place of residence. It then also follows that Vineet "discovered or should have discovered" Rushmi's perjury as to her monthly living expenses at that time as well; if Vineet declared in his opposition to the OSC in 2008 that Rushmi had no legal visa to enter or stay in the United States and was residing in India, then he already had facts in mind, not speculation, supporting the notion that Rushmi perjured herself.

Further, unlike *Rubenstein*—where the evidence from the federal action on which wife relied in bringing her set aside motion did not exist before and thus could not have been discovered earlier—here, the evidence on which Vineet relied, namely, the FRRO report, was not "new" evidence, as Vineet could have subpoenaed and/or propounded discovery to obtain a copy of Rushmi's passport or an FRRO report showing the dates of her travels as early as when he was served with a copy of Rushmi's OSC for support and fees in 2008.

As to Rushmi's alleged perjury regarding her lack of income, lack of education and marketable skills (factors in determining her earning ability, which would affect the support calculation per § 4320), and lack of access to community assets or funds (as she claimed Vineet had "exclusive control"), per *Rubenstein*, we believe the one-year window for Vineet to file a motion to set aside under section 2122, subdivision (b) started October 28, 2015, when Vineet heard Rushmi's testimony in India.[12]

Although Vineet filed his second RFO in April 2016 within the six-month period, the trial court denied his request because it was "not timely" and because "the evidence does not establish what is required"; the court also found that although Vineet showed that Rushmi "may have committed perjury in an [IED] in 2008," he made no showing that "the trial and Judgment in 2010 were based on the earlier [IED]." As already mentioned, Rushmi's most recent and/or "current" IED at the time of trial and judgment was filed September 30, 2009. That IED looks to be the mirror image of the 2008 IED, except for two differences: Rushmi claimed to have earned no income for 24 years instead of

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[12] Vineet's prior RFO pinpointed Rushmi's alleged perjury as to her place of residence and not her alleged perjury as to income. Rushmi's counsel impliedly confirmed this during the August 25, 2009 hearing when he said, "She has no source of income. That's *undisputed*." (Italics added.) If it was "undisputed," then it follows Vineet had not alleged that Rushmi perjured herself as to her income as of the date of the August 2009 hearing.

23 years, and included $1,300 in monthly spousal support that she was receiving at the time.[13]

Nevertheless, even if we find that substantial evidence did not support the court's May 2016 order because the two IEDs were essentially identical, the fact remains the May 2016 order is *not* before this court on appeal. Vineet filed a previous appeal of the court's May 12, 2016 order; it was dismissed for his failure to file an opening brief.

Thus, what we have before us on appeal is the trial court's orders made December 7, 2017. The FRRO report submitted by Vineet was not "new" evidence, per *Rubenstein* standards, as proof of Rushmi's travels existed in 2008; Vineet could have subpoenaed her travel records or propounded discovery as early as 2008. Alas, he did not, and by the time he did, many years had passed and the one-year statute of limitations to bring the FRO under section 2122, subdivision (b) had already expired.

Consequently, we cannot say the court abused its discretion in denying Vineet's October 16, 2017 motion.

C. *Vineet's Request to Set Aside the October 2008 Support Order and the October 2014 Modified Default Judgment's Support Provision Was Properly Denied.*

In his opening brief, Vineet next argues that the trial court committed reversible error in relying on the temporary support calculations in the October 2008 Order when it calculated permanent spousal support during the default trial and in the

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[13] Rushmi indicated she received $1,300 in monthly spousal support in the 2009 IED, but noted Vineet "is not complying with the order." We presume the $1,300 is the amount that was garnished from Vineet's wages as a result of the October 6, 2008 earnings assignment order.

default judgment. Vineet's arguments go to the default trial in 2008 and the modified default judgment entered in 2014. The appeal before us pertains to the trial court's orders made December 7, 2017.

Vineet contends the monthly permanent spousal support figure of $4,500 awarded to Rushmi after the default trial and in the default judgment is "strikingly similar" to the monthly temporary spousal support figure of $4,424 awarded per the October 2008 Order. If Vineet wanted to contest these calculations, he should have pursued a timely appeal after the judgment was entered. (See Cal. Rules of Court, rule 8.104.)

Furthermore, Vineet's October 16, 2017 request to set aside the spousal support portion of the October 2008 Order was not timely. After the six-month time limit for Code of Civil Procedure section 473, subdivision (b) relief expires, spousal support orders are subject to set aside only upon the grounds and within the time limits specified in section 3690 et seq. (§§ 3690, subd. (a), 3691, subd. (a); see also *In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 910–911.) The party seeking to set aside a spousal support order based on actual fraud or perjury must file said motion *within six months* after the date on which the complaining party discovered or reasonably should have discovered the fraud or perjury. (§ 3691, subds. (a)–(b); see *Zimmerman*, *supra*, at p. 914.) Needless to say, Vineet's underlying motion was not filed within six months of October 2008.

Similarly, after expiration of the time allowed to seek relief under Code of Civil Procedure section 473, subdivision (b), a spousal support judgment may be set aside only upon the grounds and within the time limits specified in section 2122.

(§ 2120 et seq.) For the same reasons discussed above, we find no abuse of discretion by the trial court in denying Vineet's motion.[14]

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[14] Vineet is not precluded from filing a post-judgment RFO—with the superior court—to downwardly modify and/or terminate permanent spousal support on the basis of a material change in circumstances since the most recent support order. (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 396 [a change of circumstances includes all factors affecting need and ability to pay]; *In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1272–1273 [a change of circumstances could mean reduction in supporting spouse's ability to pay and/or decrease in supported spouse's needs; it is an abuse of discretion for the court not to consider and weigh all of the § 4320 factors in modifying support].)

"In marriages of 'long duration' (presumptively 10 years or longer), the court is deemed to retain spousal support jurisdiction 'indefinitely' (notwithstanding the absence of an express reservation of jurisdiction) absent written agreement of the parties to the contrary or a court order terminating spousal support. [Citations.]" (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 17:92.) Here, the parties' judgment contains an express termination of jurisdiction over the issue of support "to Respondent [Vineet] from Petitioner [Rushmi]," but not as to support to Rushmi from Vineet. As the parties have a long-term marriage and because the judgment expressly states that the support figure shall continue "until . . . further order of [c]ourt," it appears the trial court may not be precluded from considering an RFO to modify and/or terminate support; we render no opinion, however, as to the merits of any such RFO.

DISPOSITION

Respondent's motion to dismiss is denied. The trial court's December 7, 2017 orders are affirmed. In the interests of justice, the parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.

We concur:

BIGELOW, P. J.

WILEY, J.